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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Yvonne Derry,

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No. CV09-2549-PHX-NVW

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Plaintiff,

)

**ORDER**

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vs.

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American Brokers Conduit; American Home Mortgage Servicing, Inc.; Freestand Financial Holdings, Inc.; American Home Mortgage Holdings, Inc.; American Home Mortgage Investment Corp.; Countrywide Home Loans, Inc.; Bank of America Home Loans; Homesite Settlement Services, Inc.; Trustee for Transaction,

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Defendants.

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Before the Court are Defendants Countrywide Home Loans, Inc. and Bank of

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America’s Motion to Dismiss (collectively “B of A Defendants”) joined by Defendant

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American Home Mortgage Servicing, Inc. (“American Home”) (doc. ## 10, 11) and B of

23

A Defendants’ Motion to Strike Plaintiff’s “Memorandum of Law and Response for

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Details” (doc. # 18).

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**I. Motion to Strike**

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A motion to strike may be filed only if it is authorized by statute or rule or if it

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seeks to strike any part of a filing on the ground that it is not authorized by a statute, rule,

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or court order. LRCiv 7.2(m)(1). B of A Defendants move to strike Plaintiff’s

1 Memorandum of Law and Response for Details on the ground that it is not authorized by  
2 a statute, rule, or court order. Local Rules permit only a motion, response, and reply.  
3 LRCiv 7.2(c), (d). They do not authorize the non-moving party to file a response to the  
4 moving party's reply.

5 Therefore, Plaintiff Pro Se's Memorandum of Law and Response for Details (doc.  
6 # 18) will be ordered stricken. Plaintiff is not prejudice by the Court's ruling on the  
7 Motion to Strike without awaiting a response because the Court has examined Plaintiff  
8 Pro Se's Memorandum of Law and Response for Details (doc. # 18), and nothing therein  
9 would affect the Court's ruling on the Motion to Dismiss.

## 10 **II. Motion to Dismiss**

### 11 **A. Rule 8, Federal Rules of Civil Procedure**

12 A claim must be stated clearly enough to provide each defendant fair opportunity  
13 to frame a responsive pleading. *McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996).  
14 "Something labeled a complaint . . . , yet without simplicity, conciseness and clarity as to  
15 whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a  
16 complaint." *Id.* at 1180. A complaint must contain "a short and plain statement of the  
17 claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Each  
18 allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). A complaint  
19 having the factual elements of a cause of action present but scattered throughout the  
20 complaint and not organized into a "short and plain statement of the claim" may be  
21 dismissed for failure to satisfy Rule 8(a). *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635,  
22 640 (9th Cir. 1988).

23 In order to assist litigants to understand the Rule 8(d)(1) requirements that  
24 allegations "be simple, concise, and direct," Rule 84 of the Federal Rules of Civil  
25 Procedure provides examples in an Appendix of Forms, which are "intended to indicate  
26 the simplicity and brevity of statement which the rules contemplate." *McHenry*, 84 F.3d  
27 at 1177. An example is Form 11 (Complaint for Negligence):

28 1. (Statement of Jurisdiction—See Form 7.)

1           2. On *date*, at *place*, the defendant negligently drove a motor vehicle  
2 against the plaintiff.

3           3. As a result, the plaintiff was physically injured, lost wages or  
4 income, suffered physical and mental pain, and incurred medical expenses  
5 of \$\_\_\_\_\_.

6           Therefore, the plaintiff demands judgment against the defendant for  
7 \$\_\_\_\_, plus costs.

8 *Id.*

9           Derry's complaint is titled "Complaint for Fraud and Complaint for Collusion." It  
10 alleges the "mortgage note" on Derry's home violates consumer protection laws  
11 including, but not limited to, "the Truth in Lending Act (TILA), Consumer Protection  
12 Act, Real Estate Settlement Procedures Act, (RESPA) at 15 U.S.C. § § 1601 et seq. and  
13 12 U.S.C. § § 2601 et seq., and the Home Ownership and Equity Protection Act  
14 (HOEPA)." It does not allege general facts about the "mortgage note," such as the date,  
15 terms, and parties. It does not identify which Defendants allegedly committed which acts.  
16 Portions of the Complaint appear to be copied and inserted from other documents, such as  
17 generic demand letters. It rambles on for 19 pages and is, in places, incoherent. Much of  
18 it consists of legal conclusions, not factual allegations.

19           Derry's "Complaint for Fraud and Complaint for Collusion" does not meet the  
20 requirements of Fed. R. Civ. P. 8(a) and 8(d)(1).

21           **B.     Rule 9(b), Federal Rules of Civil Procedure**

22           "In alleging fraud or mistake, a party must state with particularity the  
23 circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b) requires  
24 allegations of fraud to be "specific enough to give defendants notice of the particular  
25 misconduct which is alleged to constitute the fraud charged so that the can defend against  
26 the charge and not just deny that they have done anything wrong." *Bly-Magee v.*  
27 *California*, 236 F.3d 1014, 1019 (9<sup>th</sup> Cir. 2001). "While statements of the time, place and  
28 nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of  
fraud are insufficient." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9<sup>th</sup>  
Cir. 1989). Further,

1 Rule 9(b) does not allow a complaint to merely lump multiple defendants  
2 together but requires plaintiffs to differentiate their allegations when suing  
3 more than one defendant and inform each defendant separately of the  
4 allegations surrounding his alleged participation in the fraud. In the context  
5 of a fraud suit involving multiple defendants, a plaintiff must, at a  
6 minimum, identify the role of each defendant in the alleged fraudulent  
7 scheme.

8 *Swartz v. KPMG LLP*, 476 F.3d 756, 764 -765 (9<sup>th</sup> Cir. 2007) (internal quotation marks,  
9 alteration marks, and citations omitted).

10 Derry’s “Complaint for Fraud and Complaint for Collusion” does not identify the  
11 role of each Defendant in the alleged fraudulent scheme. Further, although the Complaint  
12 generally alleges Defendants made misrepresentations about funding the loan transaction,  
13 it does not specify who said what when and to whom, which are facts Defendants require  
14 to respond to the Complaint. To the extent that Derry intended to plead a fraud claim, the  
15 “Complaint for Fraud and Complaint for Collusion” does not meet the requirements of  
16 Fed. R. Civ. P. 9(b).

17 **C. Rule 12(b)(6), Federal Rules of Civil Procedure**

18 On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material  
19 fact are assumed to be true and construed in the light most favorable to the nonmoving  
20 party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9<sup>th</sup> Cir. 2009). Dismissal under Rule  
21 12(b)(6) can be based on “the lack of a cognizable legal theory” or “the absence of  
22 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*  
23 *Dep’t*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990). To avoid dismissal, a complaint must contain  
24 “only enough facts to state a claim for relief that is plausible on its face.” *Bell Atl. Corp.*  
25 *v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff  
26 pleads factual content that allows the court to draw the reasonable inference that the  
27 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, \_\_ U.S. \_\_, 129 S. Ct.  
28 1937, 1949 (2009). “The plausibility standard is not akin to a ‘probability requirement,’  
but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

1 First, the Court must identify allegations in the complaint that are not entitled to  
2 the assumption of truth. *Id.* at 1949, 1951. The principle that a court accepts as true all of  
3 the allegations in a complaint does not apply to legal conclusions or conclusory factual  
4 allegations. *Id.* at 1949, 1951. “Threadbare recitals of the elements of a cause of action,  
5 supported by mere conclusory statements, do not suffice.” *Id.* at 1949. “A plaintiff’s  
6 obligation to provide the grounds of his entitlement to relief requires more than labels and  
7 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”  
8 *Twombly*, 550 U.S. at 555.

9 Second, the Court must determine whether the factual allegations plausibly  
10 suggest an entitlement to relief. *Iqbal*, 129 S. Ct. at 1950, 1951. This determination is “a  
11 context-specific task that requires the reviewing court to draw on its judicial experience  
12 and common sense.” *Id.* at 1950. To show that the plaintiff is entitled to relief, the  
13 complaint must permit the court to infer more than the mere possibility of misconduct.  
14 *Id.*

15 Because Derry’s “Complaint for Fraud and Complaint for Collusion” does not  
16 include “simple, concise, and direct” allegations and does not identify who allegedly did  
17 what to whom, it is difficult to determine what legal theory forms the basis for each of the  
18 five counts. It is not necessary to do so, however, because most of the Complaint consists  
19 of legal conclusions or conclusory factual allegations, which the Court does not accept as  
20 true on a motion to dismiss. Further, it is impossible to determine whether any of the  
21 counts are time-barred because the Complaint does not identify the date of any alleged  
22 misconduct. The Complaint appears to seek rescission of the loan transaction, which  
23 requires the homeowner to return to the lender everything the homeowner received from  
24 the lender, but the Complaint does not allege that Derry has offered to return the entire  
25 amount of the loan plus interest and is able to do so. Moreover, the Complaint does not  
26 allege that Derry has been evicted, her home has been sold, or she has suffered any  
27 adverse consequences as a result of any misconduct of any of the Defendants.  
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1           The Complaint will be dismissed under Fed. R. Civ. P. 12(b)(6) because it does not  
2 contain “enough facts to state a claim for relief that is plausible on its face.” *See Bell Atl.*  
3 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

4 **III. Leave to Amend**

5           Leave to amend should be freely given “when justice so requires.” Fed. R. Civ. P.  
6 15(a)(2). Derry will be given an opportunity, if she so chooses, to amend her complaint  
7 to make clear her allegations in short, plain statements. In the amended complaint, Derry  
8 must write out the rights she believes were violated, the name of each Defendant that  
9 violated the right, exactly what each Defendant did or failed to do, how the action or  
10 inaction of that Defendant is connected to the violation of Derry’s rights, and what  
11 specific injury Derry suffered because of the Defendants’ conduct. *See Rizzo v. Goode*,  
12 423 U.S. 362, 371-72, 377 (1976). Any amended complaint filed by Derry must conform  
13 to the requirements of Rule 8(a) and (d)(1) of the Federal Rules of Civil Procedure.

14           Derry is warned that if she elects to file an amended complaint and if she fails to  
15 comply with the Court’s instructions explained in this order, the action will be dismissed  
16 pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. *See McHenry*, 84 F.3d at  
17 1177 (affirming dismissal with prejudice of prolix, argumentative, and redundant  
18 amended complaint that did not comply with Rule 8(a)); *Nevijel v. North Coast Life Ins.*  
19 *Co.*, 651 F.2d 671, 673-74 (9th Cir. 1981) (affirming dismissal of amended complaint that  
20 was “equally as verbose, confusing, and conclusory as the initial complaint”); *Corcoran*  
21 *v. Yorty*, 347 F.2d 222, 223 (9th Cir. 1965) (affirming dismissal without leave to amend  
22 second complaint that was “so verbose, confused and redundant that its true substance, if  
23 any, [was] well disguised”).

24 **IV. Attorneys’ Fees**

25           American Home requests under A.R.S. § 12-341.01(A) an award of attorneys’ fees  
26 incurred in preparing its joinder in the motion to dismiss. It is premature to decide the  
27 extent to which American Home has prevailed before Derry has opportunity to amend the  
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1 Complaint. The fee request, therefore, will be denied without prejudice to seeking fees as  
2 provided in LRCiv 54.2.

3 IT IS THEREFORE ORDERED that Defendants Countrywide Home Loans, Inc.  
4 and Bank of America's Motion to Strike Plaintiff's "Memorandum of Law and Response  
5 for Details" (doc. # 18) is granted. The Clerk shall leave the Memorandum imaged in the  
6 electronic records of the court.

7 IT IS FURTHER ORDERED that Defendants Countrywide Home Loans, Inc. and  
8 Bank of America's Motion to Dismiss (doc. # 10) joined by Defendant American Home  
9 Mortgage Servicing, Inc. (doc. # 11) is granted.

10 IT IS FURTHER ORDERED that Plaintiff Yvonne Derry may file a motion to  
11 amend the Complaint and separately lodge a proposed Amended Complaint by February  
12 19, 2010. The Clerk is directed to terminate this case without further order if Plaintiff  
13 does not file a motion to amend and lodge a proposed Amended Complaint by February  
14 19, 2010.

15 IT IS FURTHER ORDERED that Defendant American Home Mortgage  
16 Servicing, Inc.'s request for award of attorneys' fees incurred in preparing its joinder in  
17 the motion to dismiss is denied without prejudice.

18 DATED this 2<sup>nd</sup> day of February, 2010.

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26 Neil V. Wake  
27 United States District Judge  
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